MIRZAN MAHATHIR

v.

STAR PAPYRUS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2(S3)-23-09-1999]
7 MARCH 2000

CIVIL PROCEDURE: *Particulars - Application for further and better particulars - Libel action - Whether vague and unspecific allegations - Whether plea of justification properly particularised*

CIVIL PROCEDURE: *Judgments and orders - "Unless order" - Entire defence to be struck off upon failure to comply with order - Whether order proper - Whether defences only lightly pleaded*

The plaintiff commenced an action against the defendant for defamatory words of the plaintiff published in an article in the Asian Wall Street Journal's issue of 4 January 1999. In this instant, the defendant appealed against the decision of the Senior Assistant Registrar ('SAR') allowing the plaintiff's application for further and better particulars with costs on an indemnity basis. The SAR had also incorporated an "unless order" whereby it was held that in the event the defendant defaulted to comply with the said order, its entire defence would be struck off.

The defendant argued that the "unless order" was improper and that it ought to be incorporated only upon default in compliance by the defendant and when the matter was again referred to the court.

The plaintiff contended that the defendant having earlier written to the plaintiff that it was merely the printer and that it bore neither ill-will nor malice against the plaintiff, subsequently filed the defences of consent, justification and fair comment. Also, that the defendant had made vague and unspecific allegations against the plaintiff with particulars of justification. As such, it was contended that the said particulars were sought for the basis of the allegations.

Held:

[1] The article, *prima facie*, was defamatory of and concerning the plaintiff since the defendant had pleaded that the defamatory meaning of the words complained of in the article were as contended in its statement of defence.

[2] The defendant must not put in a plea of justification lightly or without carefully considering all the available evidence. Further, it should be the defendant who should believe that the defamatory words were true (*McDonald's Corp & Anor v. Steel & Anor*).

[2a] There was no reference to the views or beliefs of a third party. By taking either instructions, directions or advice from the publishers and by virtually pleading ignorance by way of his earlier letter in response to the plaintiff's notice of demand, the defendant had clearly run foul of the principle as set out in *McDonald's*.

[3] There should be a need for particulars in cases where the pleadings are vague and from which it is impossible to set up a proper counter attack. There is a clear duty when relying upon a plea of justification to inform the plaintiff precisely the meanings the defendant intends to justify (*Lucas Box v. News Group Newspapers Ltd*).

[4] A defendant setting up a plea of justification must plead his case with sufficient particularity, without circumlocution or obfuscation, so as to enable the plaintiff to know the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. In other words, he must state clearly to the plaintiff what is the case he is seeking to set up.

[5] Just as a defendant pleading justification must plead with precision the meaning which he seeks to justify, the same principles must apply to a defendant who has pleaded fair comment as a defence.

[6] The defendant had blatantly and with total disregard for the rules filed a defence raising various defences. When particulars were sought, the defendant pleaded for time, contending it was requested to file such defences by a third party and that it had to await the documents and details from the third party. The defendant ought to have all documents and evidence available before filing the defence. This was a clearest case where an "unless order" ought to be made. The argument that the "unless order" granted was too draconian in that it allowed for the striking off of the entire defence was devoid of merit. Further, the defendant's conduct had been contumelious.

[7] The menial and subservient attitude adopted by the defendant in complying with the publisher to include the defences of consent, justification, qualified privilege and fair comment in its defence after

initially writing to the plaintiff that it bore neither ill-will nor malice against the plaintiff was a clear indication that costs on a full indemnity basis be paid forthwith.

[Appeal dismissed.]

Case(s) referred to:
Atkinson v. Fitzwalter & Anor [1987] 1 WLR 201 ***(refd)***
Control Risks Ltd & Ors v. New English Library Ltd [1990] 1 WLR 183 ***(refd)***
Evans v. Granada Television Limited [1996] EMLR 429 ***(refd)***
Goldschmidt v. Constable & Co [1937] 4 All ER 293 ***(refd)***
Gordon v. Amalgamated Television Services Pty Ltd & Anor [1980] 2 NSWLR 410 ***(refd)***
Grand Metropolitan Nominee (No 2) Co Ltd v. Evans [1993] 1 All ER 642 ***(refd)***
Lucas-Box v. News Group Newspapers Ltd [1986] 1 WLR 147 ***(refd)***
McDonald's Corp & Anor v. Steel & Anor [1995] 3 All ER 615 ***(refd)***
Morrell v. International Thomson Publishing Ltd & Ors [1989] 3 All ER 733 ***(refd)***
Prager v. Times Newspapers Ltd [1988] 1 WLR 77 ***(refd)***
S Pakianathan v. Jenni Ibrahim [1988] 2 MLJ 173 ***(refd)***
Tan Hoe Hock & Anor v. Ali Akarbara bin Mangudin & Ors [1997] 4 MLJ 311 ***(refd)***
Viscount De L'lsle v Times Newspapers Ltd [1987] 3 All ER 499 ***(refd)***
Wootton v. Sievier [1913] 3 KB 499 ***(refd)***
Zierenberg v. Labouchere [1893] 2 QB 187 ***(refd)***

Legislation referred to:
Libel and Slander, Gatley, 9th edn, pp 238, 688 paras 11.6, 27.7
Libel and Slander, Carter-Ruck, 1997, 5th edn, pp 103, 104

For the appellant/defendant - Gurmeet Kaur (Amizaizul Izral Amran with him); M/s Bhag Sulaiman & Co
For the respondent/plaintiff - VK Lingam; M/s VK Lingam & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff's claim against the defendant is for damages and for an injunction restraining the defendant whether by itself, its directors, servants or otherwise howsoever from further printing, publishing or causing to be printed and

published the said or similar words or matter defamatory of the plaintiff with interest and costs. The defendant is and has been at all material times the printer of the Asian Wall Street Journal (AWSJ). The said defamatory words of the plaintiff were published in the AWSJ's issue of 4 January 1999. The writ and statement of claim were served on the defendant on 4 February 1999 and the defence filed on 1 March 1999. There was also a reply filed on 15 March 1999. Having filed the reply the plaintiff then took out a summons seeking further and better particulars (the particulars) of the defendant's defence pursuant to O. 18 r. 12 of the Rules of the High Court 1980 (the RHC). The said application contained an "unless order". The plaintiff's solicitors had by a letter dated 26 March 1999 requested the defendant to furnish the particulars within 14 days from the date of the letter. The defendant's solicitors by their letter dated 6 April 1999 informed the plaintiff's solicitors that they were considering the request for the particulars and sought "for an extension of time". By their letter dated 20 April 1999 the plaintiff's solicitors granted the extension sought until 23 April 1999. Since the defendant had failed and/or refused to furnish the particulars sought, the plaintiff filed the summons. In *Tan Hoe Hock & Anor v. Ali Akarbara bin Mangudin & Ors* [1997] 4 MLJ 311 I had said at pp. 320/321 as follows:

> It is meet and proper at this stage to state that a party seeking particulars should do so pursuant to O. 18 r. 12(1). He should of course make a request for the particulars sought by way of a letter first and if the said request is complied with, there would then be no need for any application to be made to this court. The opposite party must then furnish the said particulars by way of Form 35 of the RHC 1980. However, if the opposite party refuses to respond to the request for further particulars made pursuant to a letter, then the party seeking particulars must file an application pursuant to O. 18 r. 12(3) with a supporting affidavit giving reasons for seeking such particulars.

The learned Senior Assistant Registrar (SAR) allowed the application with costs on an indemnity basis to be paid by the defendant. The said order also incorporated an "unless order" whereby, in the event of any default in the compliance of the order, the defendant's entire defence would be struck off. This is the defendant's appeal against that order.

The Plaintiff's Case

In para. 3 of his statement of claim the plaintiff repeated the words complained of and in para. 5 of the said statement of claim the plaintiff pleaded the natural and ordinary meaning attributed to the words complained of. It is necessary that for a proper consideration of this appeal I reproduce the meaning attributed to the words complained of by the plaintiff:

Particulars Of Meaning

(1) The plaintiff has been given substantial and potentially lucrative opportunities to invest in and develop business in Malaysia solely because he is the eldest son of the Malaysian Prime Minister and has thereby sought to build a business empire not upon his own ability or merit but as a willing beneficiary of nepotism, favouritism and privilege; and

(2) The plaintiff has, notwithstanding the advantages he has been so given, conducted his business affairs in an incompetent or negligent manner and has only survived because he has exploited his position as the Prime Minister's son and permitted the Malaysian Government, under the influence of his father, to bail him out of his financial difficulties.

The plaintiff contended that by reason of the publication of the said words complained of as stated in para. 3 of the statement of claim the plaintiff had been gravely injured in his feelings, and that his personal, professional and business reputation has been seriously damaged and that he has been brought into public scandal, odium and contempt. The words complained of as found in para. 3 is a reproduction of a lengthy article and I do not intend to reproduce the same for the purposes of this appeal. The plaintiff filed this application for particulars because he contended that when he instructed his solicitors to send a notice of complaint to the defendant on 6 January 1999 before filing the writ, the defendant replied on 8 January 1999 and in more detail on 15 January 1999 pleading that he was merely the printer and that he bore neither ill will nor malice against the plaintiff whatsoever. Subsequently, when the defence was filed, the plaintiff was astonished to note that the defence pleaded included consent, fair comment and justification. What the plaintiff contended as most obnoxious were the particulars pleaded in respect of justification which effectively alleged, amongst other things, corruption against him, despite the fact that the defendant had not ventured to specifically use the word "corruption". Against this backdrop of vague and the unspecific nature of the allegations made against him with particulars of justification and since by his reply the plaintiff has pleaded that all such allegations are untrue and misconceived or that they contain facts which are true, but that such facts have been so twisted as to portray the plaintiff in a bad light, the plaintiff sought particulars, of the basis for the allegations.

Case For The Defence

The defendant's case is that the learned SAR was wrong to have granted the order since the application had no merit.

Findings Of The Court

I have read the letter dated 15 January 1999 written by the defendant's solicitors to the plaintiff's solicitors. The letter contends that the defendant's involvement in this matter is only as printer and that under the agreement entered into with the publisher, the defendant was obliged to print as provided in the copy. It clearly and expressively contained the message (and not even headed without prejudice) that the defendant neither bore any ill will nor malice against the plaintiff whatsoever. The defendant then sought time "to communicate on the subject with the publisher".

Justification

Having contended that it personally had no ill will because it was a mere printer, the impression given by its earlier letter was that it was an innocent pawn in the publication. However after informing the plaintiff that it intended to revert to the publisher, and subsequently filing various defences including justification, the impression given to the court is that the defendant has indeed taken directions or has been informed by its publishers of matters thus enabling the defendant to rely on the defence as pleaded. It is necessary to cite one paragraph, namely para. 7 of the defence which reads as follows:

> 7. Further or in the alternative, the said words are true in substance and in fact and bore the meaning that the plaintiff was over ambitious in his initial business operations, for which he received loans and support on favourable terms from banks and state-owned companies for businesses which the Government (of whom his father was head) regarded as crucial to national development, that some advantages were available because of his father's position and he willingly took them; that he initially succeeded but ran into difficulties because he lacked business experience in shipping, he was too blase about the difficulties of managing and building a shipping business and was too confident about the industry's future which he thought was rosier than it turned out to be and because he acquired too many capital-intensive assets and paid too much for Pacific Basic Bulk Shipping Ltd and became overly dependent on overseas loans; in consequence the plaintiff has been forced to restructure his loans in order to survive, assisted by the purchase of his company's ships by a unit of Petroliam Nasional Berhad.

As to whether the plaintiff was right to have reproduced the entire article, I need to do no better than to refer to *Gordon v. Amalgamated Television Services Pty Ltd & Anor* [1980] 2 NSWLR 410 where the court held that where the publication sued upon is in written form, a plaintiff is obliged to include within his pleading every passage which materially alters or qualifies

the complexion of the imputation complained of. The justification for that rule is the principle that the effect of the matter complained of must be taken from the whole of what has been published.

It is necessary for me to bear in mind that the defendant has pleaded justification within the meaning as set out in *Lucas-Box.* In *Lucas-Box v. News Group Newspapers Ltd* [1986] 1 WLR 147 the Court of Appeal held that where a defendant in defamatory proceedings wishes to rely on a plea of justification he must make clear in the particulars of justification the case which he is seeking to set up and must accordingly state clearly and explicitly the meaning which he seeks to justify. With this principle as set out in *Lucas-Box* it is necessary therefore for me to find that *prima facie* the article is defamatory of and concerning the plaintiff since the defendant has pleaded that the defamatory meaning of the words complained of in the article are as contended in para. 7 of the defence.

O. 78 r. 3(2) of the RHC reads as follows:

> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

It is trite that the defendant must not put in a plea of justification lightly or without carefully considering the available evidence before him and as to such evidence as would be likely to be available to him. (See *McDonald's Corp & Anor v. Steel & Anor* [1995] 3 All ER 615 at 621.) On this issue Neill LJ whilst restating the criteria that should normally be satisfied before a plea of justification is included in a defence, added a pre-condition that a plea of justification should be properly particularised. He further emphasised that it should be that the defendant should be the person who should believe that the words were true. He said at p. 621:

> ... Nevertheless I am satisfied that before a plea of justification is included in a defence the following criteria should normally be satisfied: (a) the defendant should believe the words complained of to be true; (b) the defendant should intend to support the defence of justification at the trial; and (c) the defendant should have reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial.
>
> A similar approach should be adopted towards facts which are relied upon in support of a fair comment.

There is no reference to the views or beliefs of a third party. It is therefore clear to me that by taking either instructions or directions or advice from the publishers and by virtually pleading ignorance by way of his earlier letter in response to the plaintiff's notice of demand, the defendant has clearly run foul of the principle set out by Neill LJ in *McDonald's* which principle I accept and adopt.

As a rider it is necessary for me to point out that in *McDonald's* the defence had been settled by litigants in person and the defects within their pleadings had not been made good, hence the application to strike out was made. In my view the decision in *McDonald's* represents the high watermark of indulgence towards a defendant. In the case before me the defendant here is represented by leading lawyers and therefore it is inappropriate to extend that same indulgence to the defendant herein who is competently represented. That there should be a need for particulars in cases where the pleadings are vague and from which it is impossible to set up a proper counter attack is to refer to the words of Parker LJ in *Atkinson v. Fitzwalter & Anor* [1987] 1 WLR 201. This is what his Lordship said at p. 213:

> The matters subsequently pleaded consist in allegations concerning the plaintiff's treatment of eight individual patients and occupy the remaining pages. Many of the details given do not in my view go to the charges sought to be justified at all. In many instances it is impossible to ascertain quite what the defendants are alleging. Despite the overall length of the pleading it cries aloud for particulars. With respect to the pleader, I am bound to say that it is in my view prolix and embarrassing and one which ought not to be allowed in its present form. If by some reasonable pruning and reasonable request for particulars it could be cured it might, subject to considerations hereafter to be mentioned, be allowed, but in my view its defects go beyond this and I would for my part simply disallow it. If this course were taken without more the defendants would, however, then be free to re-think and apply hereafter to make an amendment in proper form.

There is a clear duty when relying upon a plea of justification to inform the plaintiff precisely the meanings the defendant intends to justify (see *Lucas-Box*). This principle was adopted by a later Court of Appeal in *Viscount De L'lsle v Times Newspapers Ltd* [1987] 3 All ER 499 which acknowledged that this principle as set out in *Lucas-Box* "may have broken new ground". More amplification was given to this principle by the decision of yet another Court of Appeal in *Morrell v. International Thomson Publishing Ltd & Ors* [1989] 3 All ER 733. May LJ said at pp. 737/738 as follows:

> ... In any event I think the position now is that a defendant who pleads justification must do so in such a way as quite clearly, without circumlocution or obfuscation, to inform the plaintiff and the court of precisely what meaning or meanings the defendant may seek to justify.

Based on all these decisions which I accept, it is my conclusion that a defendant setting up a plea of justification must plead his case with sufficient particularity, without circumlocution or obfuscation, so as to enable the plaintiff to know the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. In other words, he must state clearly to the plaintiff what is the case that he is seeking to set up.

It is trite law that a defamatory imputation is presumed to be false and the burden is upon the defendant to show that it is substantially true. (See *S Pakianathan v. Jenni Ibrahim* [1988] 2 MLJ 173 SC.) However, it must also be noted that in *Prager v. Times Newspapers Ltd* [1988] 1 WLR 77 Purchas LJ said at p. 88 that:

> ... a defendant was entitled to plead by way of justification in support of any defamatory meaning which the words complained of could reasonably bear.

This view, no doubt of course, is subject to the caveat that the case ought to be pleaded with sufficient particularity to enable the plaintiff to know precisely the case he has to meet (applying the *Lucas-Box* principle). In my judgment, it follows therefore that whether the words complained of are capable of bearing the defendant's *Lucas-Box* meaning, is a relevant consideration to, and the foundation for, making the application for further and better particulars. It is also clear to me that the meaning of the words complained of and the defendant's *Lucas-Box* meaning are inextricably linked because a *Lucas-Box* meaning must not only be defamatory of the plaintiff but also have a meaning which the words complained of can reasonably bear (see Purchas LJ's view in *Prager*, *supra*). In fact this point has been very succinctly expressed in *Gatley on Libel and Slander* (9th edn) at p. 238 para 11.6. It reads as follows:

> Justification required of, and limited to, the imputation.
>
> It is the imputation contained in the words which has to be justified, not the literal truth of the words, nor some other, similar charge not contained in the words. This has two consequences. First, the defendant may succeed in a plea of justification even though what he has said may be inaccurate in a number of respects. Secondly, he may not, under a plea of justification prove the truth of other facts damaging to the plaintiff's reputation, even if they are in the same sector of the plaintiff's life, and would be no less damaging to the plaintiff's reputation. The issue of what may be advanced under a plea of justification is therefore closely linked to the meaning or meanings which the defamatory words are reasonably capable of bearing.

This means that a defendant who commits himself to pleading a defence of justification cannot later be heard to say that the words complained of, do not bear any meaning defamatory of the plaintiff. The particulars of

justification pleaded in support must even with a *Lucas-Box* type of plea, be pleaded clearly so as to inform the plaintiff what the defendant is seeking to justify. In compliance with this requirement, the defendant must set out all the facts and matters relied upon in support of his plea of justification. It is my judgment that when a defendant by its *Lucas-Box* meaning or in reliance of its particulars of justification, makes a serious allegation of dishonesty or other improper conduct, even suggestive of acts of corruption, the obligations referred to, become even more compulsory and obligatory upon the defendant. On this it is necessary to cite a passage from Carter-Ruck on *Libel and Slander* 5th edn, 1997 at p. 103. It reads as follows:

> ... A defendant who pleads justification is required to deliver full particulars of the facts and the matters upon which he relies in support of such a plea and the evidence at the trial in support of this plea will be strictly confined to these particulars. The particulars must be sufficiently detailed not merely to enable the plaintiff to go to trial knowing the general lines of the case which is to be made against him, but to know the particular facts which the defendant alleges against him and which go to justify the imputation contained in the libel.

In fact, in *Wootton v. Sievier* [1913] 3 KB 499 Kennedy LJ in delivering the judgment of the Court of Appeal said at p. 508 (quoting Lord Esher MR in *Zierenberg v. Labouchere* [1893] 2 QB at p. 187):

> '... The plea ought to state the charge with the same precision as in an indictment.' Further, as a general rule it is now, I think, established, that, if the particulars are such as the defendant ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of persons whom he may intend to call as witnesses at the trial.

There is one other issue I must consider. Despite Neill LJ's observation in the *Mcdonald's* case, that a defence of justification may be pleaded subject to the pre-condition that it be properly particularised, Carter-Ruck on *Libel and Slander* 5th edn 1997 makes it clear at p. 104 that:

> ... Nevertheless, the Court will still set its face against the process of discovery being used as a 'fishing' expedition for the purpose of collecting material to support vague and unparticularised allegations. Discovery will not be granted to enable particulars of justification to be delivered. On the contrary, discovery will not be ordered until the particulars of justification have been delivered.
>
> A plaintiff facing a defence of justification is only obliged to give discovery of material relating to the matter alleged in the defendant's particulars of justification. But a defendant must give discovery of all documents relevant to matters put in issue by his plea itself and the meaning it asserts to be true. So where the meaning to be justified was whether there were reasonable grounds to suspect the plaintiff of certain conduct, the question was whether

there were grounds and whether they were reasonable when viewed objectively and not only whether the matters relied on by the defendant in his particulars of justification constituted 'reasonable grounds to suspect'. Accordingly, the defendant had to give discovery of any documents tending to show that the plaintiff was innocent of what was alleged.

It follows that it is extremely rash to assume it will be possible to justify a libel or slander in a court of law because the imputation happens to be notorious, or because there is every reason to believe the books and papers of the persons attacked will prove it to be well founded. The publisher of a defamatory statement is not generally in a position to plead justification unless he has available the requisite information or sources of information to enable him to deliver full and detailed particulars of the matters substantiating the allegations: if he wishes to attack he must have his proof ready and to hand or he should not put pen to paper.

It is clear therefore and as established by a series of cases (see *Evans v. Granada Television Limited* [1996] EMLR 429 at 434 where the Court of Appeal held that a party cannot get discovery to find the case about which he knows nothing) that in a libel action, as said by Greer LJ in *Goldschmidt v. Constable & Co* [1937] 4 All ER 293 at p. 294:

... the party who alleges that the defamatory statements are true must make out his case on the information which he had in his possession at the time when the defence was delivered. He is not entitled to wait for discovery in order to complete his attack, but must give full particulars before discovery.

It is my judgment that the particulars pleaded must support the defendant's *Lucas-Box* meaning so that if any particulars fall outside the ambit of the *Lucas-Box* meaning such particulars ought to be struck out and/or if the *Lucas-Box* meaning makes any allegation which is unsupported by the particulars, that part of the *Lucas-Box* meaning should equally be struck out.

Abuse Of Process

It is an abuse of process of the court to plead particulars which are ostensibly there to support the *Lucas-Box* meaning but, which being defective, for any or all of the reasons identified, are there, in reality, as a means of smearing the plaintiff and/or to support an argument that the plaintiff should receive smaller damages. The court must be ever vigilant to ensure that its procedures are not abused in this way. (See *Gatley on Libel and Slander* 9th edn, p. 688 para. 27.7; see also the decision of the Court of Appeal in *Atkinson v. Fitzwalter & Anor* [1987] 1 WLR 201 at 210.)

Fair Comment

Reliance must be placed on O. 78 r. 3(2) of the RHC. (See also the views expressed by Neill LJ in the *McDonald's* case where he held that his views as expressed in relation to justification "should be adopted towards facts which are relied upon in support of a plea of fair comment".) It is therefore a necessary corollary that just as a defendant pleading justification must plead with precision the meaning which he seeks to justify, the same principles must apply to a defendant who has pleaded fair comment as a defence. In fact, Nicholls LJ very succinctly stated this principle in *Control Risks Ltd & Ors v. New English Library Ltd* [1990] 1 WLR 183 at 189 as follows:

> ... A plaintiff is entitled to know what case he has to meet under a defence of fair comment just as much as he is entitled to know what case he has to meet when faced with a defence of justification. Where justification is pleaded, a defendant is now required to spell out in his pleading the meaning of the words, which if it is their true meaning, he will seek to justify. These are the so-called *'Lucas-Box'* particulars: see *Lucas-Box v. News Group Newspapers Limited* [1986] 1 WLR 147, 153, and the observation of Mustill LJ in *Viscount De L'lsle v. Times Newspapers Limited* [1988] 1 WLR 49, 60. In my view by parity of reasoning where fair comment is pleaded the defendant must spell out with sufficient precision to enable the plaintiff to know what case he has to meet, what is the comment which the defendant will seek to say attracts the fair comment defence.

It is apparent, based on the letter dated 15 January 1999 that the defence, to cite the words of Neill LJ in *McDonald's*, pleaded lightly. His Lordship said at p. 621 as follows:

> A pleader must not put a plea of justification (or indeed a plea of fraud) on the record lightly or without careful consideration of the evidence available or likely to become available.

It is necessary to note that by his solicitors' letter dated 26 March 1999 the plaintiff explained to the defendant's solicitors why the request for further and better particulars should be provided. The defendant's reply by way of its solicitors' letter dated 6 April 1999 can be summarised, *inter alia*, as follows:

(a) That the request for particulars is being considered.

(b) That some of the defences and in respect of which the request for further and better particulars is made were inserted at the request of Dow Jones Publishing Company (Asia) Inc. and that the defendant has referred the request for particulars to them.

(c) Some of the materials sought are in the hands of third parties and these can only be obtained by subpoena and made available at the trial.

(d) That the defendant is applying to join Dow Jones Publishing Company (Asia) Inc. as a third party to these proceedings.

It is obvious from this open letter that the evidence to substantiate the defence would be available only at the trial. The plaintiff is clearly at a handicap as the defendant is unable to comply with the decision in *Lucas-Box*. The defendant has also miserably failed the test set out in *McDonald's*. It is obvious that the plaintiff is not seeking evidence, but merely particulars which he is entitled to.

Conduct Of Counsel For The Defendant

The defendant has applied to join Dow Publishing Company (Asia) Inc. as a third party to these proceedings and I am aware of the fact that Dow Jones is contesting that application. Dato' VK Lingam then informed the court that Ms. Gurmeet Kaur is also representing Dow Jones in their contest of the third party's application. Ms. Gurmeet Kaur confirmed this but contended that she did not see the relevance as she was here acting as counsel. I am surprised that counsel could act for the defendant herein and at the same time act for the third party which is contesting the third party application. To my mind, this smacks of conflict of interest. Whilst I have made no conclusions on this issue without giving Ms. Gurmeet Kaur the benefit of hearing her out, I do not think that the issue of conflict of interest is a matter for this court to decide. On the one hand, the defendant has stated through its lawyers that the defences were set up at the request of Dow Jones and yet Dow Jones is contesting the third party notice. To my mind, surely the defendant would not have acceded to a request from Dow Jones to plead such defences unless it knew that Dow Jones also had the supporting documents. Yet the defendant had made no effort to obtain these documents either before the service of the defence or following service of the request for further and better particulars. It is obvious therefore that the defendant just has not with it the documents to answer these requests for particulars. It cannot even produce the documents relied upon. The defendant was content to being subservient to the foreign publisher and no doubt was further content that its subservience would provide a complete defence to disregard rules of pleadings and the binding decisions of the courts. It is totally unacceptable that such an approach to pleadings should be allowed to attract obligations less stringent than those that usually apply.

It is my judgment that the defendant's conduct in filing such a defence and in such a deficient form, and in failing to make good the defects in the defence in breach of the rules and binding decisions, calls for an indemnity costs order.

The Specific Requests

Having considered the submissions of both counsel, for ease of reference and for practicability of consideration, I intend to adopt the format relied upon by the respondent in the manner in which he has taken the requests for particulars, at times individually, and at times a few together. Other than those specified herein I am satisfied that the rest of the remaining requests are indeed self-explanatory and are merely intended to prod the defendant into giving:

(a) the supporting facts and matters that the defendant had omitted to plead;

(b) the precise allegation which the relevant particular is supposed to support; and

(c) in certain cases, where the particular is wholly removed, either from the subject of the article or the ambit of the *Lucas-Box* meaning, the relevance of the particular to the defendant's pleaded case.

Request No. 2

The *Lucas-Box* meaning as expressed by the defendant suffers from the following defects:

(a) Although it makes a series of unequivocal and serious assertions of fact, it is vague as to its overall sting. The question is, does it seek to allege corruption since the particulars flirt with this, or something less, such as, for example, a history of incompetence in business.

(b) It is, in fact, an unwieldy and excessively long collection of assertions about the plaintiff many of which, see, for example, "was too confident about the industry's future which he thought was rosier than it turned out to be", are not, without more, defamatory at all in that, there was, after all, a recession. It is because of this that the plaintiff had to split the composite meaning up into its constituent parts, each of which being distinct.

(c) It appears to make a series of allegations about the plaintiff which are unsupported by the particulars of justification. Alternatively, where there appears to be an overlap between the particulars and the *Lucas-Box* meaning, the defendant should spell out what the allegation is that it seeks to make. It is important to see the unequivocal and bald assertions of fact

in the *Lucas-Box* meaning with the bland, and unspecific particulars pleaded in support.

Request No. 3

If this allegation is meant to be in support of the *Lucas-Box* meaning then obviously it is not sufficient, for example, to assert that the loan was "favourable" without explaining why.

Request No. 5

Again, an allegation of "favour" from the Malaysian Government must, if it is to be supported, identify the source of the favour and, if that source should prove not to be the plaintiff's father, it then requires yet further particulars, to make the connection to him. It is to be noted that the only allegation of "favouring" in the *Lucas-Box* meaning, is from the Prime Minister, or by virtue of being the son of the Prime Minister. This allegation therefore must be made good or the particulars cannot stand.

Request No. 7

The defendant must have other companies in mind to have pleaded "*inter alia*".

Request No. 8

"folded" this is not a recognised commercial transaction.

Request No. 9(a) – (e)

These I find are self-explanatory except for 9(f). These particulars are necessary because it is not obvious which *Lucas-Box* meaning this particular is directed to.

Request Nos. 13 – 14

As with particular 7.15 (and also particular 7.18 – see Request No. 18), the defendant seems able to plead certain statistics with precision. Here, the 45% share allegation, can only be known if the remaining 55% is identifiable as to the operator and to the allocation.

Request No. 16

Whilst it is a fact that this particular has been admitted in the reply I find that the plaintiff is nonetheless entitled to know why it is said to be relevant.

Request No. 20

It is reasonable to assess that particular 7.20 goes to the heart of the issues in this case. Yet I find that it is totally vague with reference to the *Lucas-Box* meaning.

Request Nos. 27, 29 and 31

It is to be noted that the defendant adopts the burden in particulars 7.25, 7.26 and 7.27 of proving not just that the plaintiff held a certain belief but that this was, in fact, true. The plaintiff had denied all three particulars in the reply. If these particulars are not properly made good, this then in a sense is defamatory of the plaintiff.

Request No. 34

Particular 7.29 (as with 7.20) flirt with the extremely serious allegation of corruption but, again, it is devoid of any particulars.

Request No. 42

Particular 7.35 is also a very serious allegation to make. Again, an allegation of "favour" from the Malaysian Government must, if it is to be supported, identify the source of the favour and, if that source should prove not to be the plaintiff's father, it requires yet further particulars to make the connection to him. It is to be noted that the only allegation of "favouring" in the *Lucas-Box* meaning, is from the Prime Minister or by virtue of being the son of the Prime Minister. So this allegation must be either made good or the particulars should be struck out.

Request No. 54

The defendant should identify which *Lucas-Box* meaning particular 7.41 is directed to. It is to be noted that the companies identified in this and the succeeding particulars do not even feature in the words complained of. It is obvious therefore that these particulars, in fact particulars 7.41 – 7.45 are attempts to introduce smears against the plaintiff.

Request No. 60

Particular 7.45 is particularly offensive. One can test the sheer ambit of this paragraph by seeking to undertake the exercise of advising the plaintiff of his discovery obligations arising from this paragraph alone. It is a catch-all particular which nonetheless makes very grave allegations. The identity of the beneficiaries is unknown and the nature of the improper benefit is unspecified.

Not a single date is given nor any other relevant fact stated. The reason for the lack of particulars is clear from the last sentence: the defendant cannot give them and is reliant upon "discovery and interrogatories". In other words, I find it clear that the defendant is treading waters with a view to a piscatorial adventure. This is totally unacceptable.

Request Nos. 61 – 64

These relate to the defence of qualified privilege. Obviously, the same obligations apply here too. These requests arise because the defendant has made controversial and serious assertions of fact that are vague and unparticularised, especially the allegation at para. 8.4(g) as to the plaintiff's alleged relationship with the Malaysian Government which, it is to be noted, is wider and so not reflected in the defendant's own *Lucas-Box* meaning.

Request Nos. 68-72

These relate to the quality of Mr. Knecht's alleged researches. This material would, in my view, have been pleaded by the defendant following an interview with Mr. Knecht or after having read a witness statement from him. The quality of his sources may only be assessed at the outset when one knows who they are. The quality and care with which his research was undertaken is also to be assessed by reference to the dates upon which it was carried out, for example, as to how long he spent on this exercise.

Request Nos. 71, 74 and 75

These seek to erect a positive case as to Mr. Knecht's *bona fides*. It is therefore relevant to know what the information was that he decided not to include and whether he is entitled to claim credit for the way in which the front page of the newspaper was laid out.

Request No. 76

The defendant must spell out with sufficient precision to enable the plaintiff to know what case he has to meet, that is, what is the comment that the defendant will seek to say attracts the defence of fair comment.

Request No. 77

The particular goes to the heart of the issues in this case. Yet I find it is hopelessly vague both on its face and by reference to the *Lucas-Box* meaning. At the very least it flirts with the extremely serious allegation of corruption and again it is devoid of any particulars.

The "Unless Order"

The defendant strongly argues against this order. I find nothing unusual for the courts to make such an order, more so if the facts disclosed warrant the making of such an order. The defendant argued that the order of the learned SAR in striking out the entire defence in the event of any default on the part of the defendant in providing the said particulars ordered to be disclosed, is improper. The defendant further contended that the learned SAR had failed to consider the contemporary practice with regard to "unless orders" in that only upon default in compliance by the defendant and when the matter is again referred to the court that the "unless order" ought to be incorporated. I do not agree, more so in this case. The defendant had blatantly and with total disregard for the rules filed a defence raising various defences. When particulars were sought for, the defendant pleaded for time, contending it was requested to file such defences by a third party and that it had to await the documents and details from the said third party. Decided authorities show that the defendant ought not to have put the cart before the horse. The defendant ought to have all documents and evidence available before filing the defence. In my opinion, this is the clearest case where an "unless order" ought to be made. The argument that the "unless order" granted was too draconian in that it allowed for the striking off of the entire defence is, in the present case, devoid of merit. The entire defence is inter-linked unlike the decision in *Grand Metropolitan Nominee (No. 2) Co Ltd v. Evans* [1993] 1 All ER 642 at 649, where the court held that "it would truly be a draconian step to strike out the whole of an extensive claim with many different facets because of the failure in respect of one or two of the many allegations to comply with an order to give further and better particulars unless it was to mark the court's displeasure at their deliberate and contumelious conduct of one of the parties". The defendant stated in its letter to the plaintiff's solicitors that by virtue of its agreement with the publishers it had to print what was sent for publication. It is clear therefore that the defendant was foolhardy in not adequately protecting itself. On the other hand, the defendant could possibly be motivated by extreme financial gain due to publication of such sensational news as a result of increased sales. The defendant has been the master of its own destiny. The defendant's conduct to say the least has been contumelious within the meaning of *Grand Metropolitan Nominee (No. 2)*. This appeal on this issue too, stands dismissed.

Costs On A Full Indemnity Basis

The defendant argued that costs on a full indemnity basis should not have been ordered by the learned SAR. I have already held that the menial and subservient attitude adopted by the defendant in complying with the request

of Dow Jones to include the defences of consent, justification, qualified privilege and fair comment in its defence, after initially writing to the plaintiff's solicitors that it "bears neither any ill will nor malice" against the plaintiff, is a clear indication that costs on a full indemnity basis be paid forthwith.

Having considered all the cases cited by both parties I have come to the clear conclusion that this appeal must stand dismissed with costs.